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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 705

JOSEPH Q. CIPRIANO,

Appellant,

versus

CITY OF HOUMA, G. LESLIE BROUSSARD, Mayor, CHRISTIAN L. OLIVIER, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLAIN,

Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana.

BRIEF OPPOSING MOTION TO AFFIRM.

KENNETH WATKINS,
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415 Goode Street,
Houma, Louisiana,
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Franklin Printing Company, Inc. • 209 Magazine St. • New Orleans • 522-9654

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May It Please the Court:

I.

THE QUESTIONS ARE SUBSTANTIAL

The Appellees in their motion to affirm seem to argue that the questions presented are not substantial because the constitutional and statutory provisions of Louisiana are not identical to those of a substantial number of states. We submit that it is totally immaterial whether the Constitution and statutes of Louisiana be identical to even one other State in order for the questions presented to be of the gravest concern and of material significance. The

questions involve the requirement of property ownership and the payment of taxes as a condition of voting in a **non-tax election.** Indeed, in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1966), this Court noted that only a "hand full of states" conditioned the franchise upon the payment of a poll tax (Footnote 4).

Appellees further argue that appellant's showing, that the funds derived from the utility system ultimately go into and benefit the General Fund, is misleading. We do not consider anyone so naive as to be uninformed of the fact that any revenue bonds sold on the basis of dedicated utility revenue must be first repaid before placing the remainder of the revenue in the General Fund of the issuing authority. At Page 8, Paragraph 3 of appellant's Jurisdictional Statement the statutory mandate that repayment be made from utility revenue is clearly set forth. We submit that no statement made or argument set forth by appellant was misleading.

Appellees further claim that since elected City Officials vote ultimately on the issuance of bonds and since all voters elect the said City Officials, then non-property-owners should not be allowed to vote in revenue bond elections because they would in effect be voting twice; once for the election of officials and once in the revenue bond election. If this be so, does not the property owner vote twice? Obviously, the issue is not how many times anyone votes, but whether the franchise, in any and all elections, be extended equally to all who have an equal interest, an equal capability and an equal right. See *Pierce v. Village of Ossining*, 68 Civ. 4150, U. S. District Court, Southern District of New York (Appendix A), and dissenting opinions in *Kramer v. Union Free School District No. 15*, 282 F. Supp. 70 (Docket No. 258, Jurisdiction Noted, October

14, 1968) and in *Cipriano v. City of Houma*, 286 F. Supp. 828 (E.D. La. 1968).

II.

AN ATTEMPT BY APPELLANT TO VOTE WOULD HAVE BEEN FUTILE.

Appellees seek to give this Court the impression that appellant had no interest in this election. At Page 117 of the Transcript of Proceedings, appellant testified that he did not own any property within the limits of the City of Houma, he further testified that he did not attempt to vote only because the announcement and publications put forth by the City indicated that only property owners could vote. See Exhibit P-1 through P-8. To have presented himself at the polls would have been a futile gesture. The law does not require such gestures as a pre-condition to redress of grievances. LRS 33:4251-4262; LRS 39:501-518.

III.

HARPER v. VIRGINIA STATE BOARD OF ELECTIONS IS NOT LIMITED IN APPLICATION TO ELECTIONS OF PUBLIC OFFICIALS.

Appellees argue that the *Harper* case should be distinguished on the grounds that it involves ". . . the election of public officials, not a local administrative election, . . .". To acknowledge such a distinction would, in effect, allow a poll tax in elections other than those involving public officials. We could not construe this to have been the Court's intention. The reasoning and rationale of the *Harper* case is that payment of a tax has no relationship to intelligent voting. The identical principal or rationale is equally applicable in the case at issue.

Since appellees make special note that the subject suit

involves a local administrative election as distinguished from an election of public officials, the case of *Pierce v. The Village of Ossining*, 68 Civ. 4150, United States District Court, Southern District of New York, November 1, 1968, is particularly noteworthy. A copy of the complete decision is annexed hereto, as Appendix A. In the *Pierce* case, a three-Judge Federal Court convened under 28 U.S.C. Section 2281 declared unconstitutional a New York statute and a portion of the Village charter on the grounds that they required property ownership as a condition of voting in a local election which was **administrative in nature** and **did not involve the election of officials.** The Court, citing *Harper v. Virginia State Board of Elections, supra,* as controlling, went on to state that since the change sought in the election affected all who live in the Village, to deny the franchise to those who do not own real property was an invidious discrimination. Likewise in the instant case, the utility system and the general revenues are owned by all of the citizens of the City of Houma and anything affecting those revenues affects all of the citizens. To deny all of the citizens the right to vote is therefore arbitrary and an invidious discrimination.

IV.

APPELLEES ARGUMENT GOES BEYOND THE RECORD IN THIS CASE

Other arguments made by appellees in that portion of appellees' motion entitled "REAL ISSUE IS PUBLIC POWER VS. PRIVATE POWER" are clearly outside of the record of this case. The introduction of these extraneous issues is evidently calculated to divert this Court's attention from the true issue of an unconstitutional limitation on the right to vote. We make no further comment on these arguments.

CONCLUSION

We submit that the arguments set forth in appellees' Motion to affirm are without merit and that the motion should be dismissed.

Respectfully submitted,

KENNETH WATKINS,
415 Goode Street,
Houma, Louisiana,
Counsel for Appellant.

CERTIFICATE

I hereby certify that a copy of the foregoing Brief opposing motion to affirm has been served on opposing counsel of record and all other counsel of record by depositing such in the United States Mail, postage pre-paid, addressed to their addresses of record.

Houma, Louisiana, December ....., 1968.

.....

KENNETH WATKINS

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Three-judge Court
68 Civ. 4150

CATHERINE PIERCE, et al.,
Plaintiffs,

—and—

GERARD T. BUTLER, RICHARD B. SMITH, ALFRED WEISS and ROBERT FLOOD,
Intervening Plaintiffs,

—against—

THE VILLAGE OF OSSINING, et al.,
Defendants.

Before FEINBERG, Circuit Judge, McGOHEY and WYATT, District Judges.

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY,
White Plains, New York
Attorney for Plaintiffs,

BERNARD CLYNE, ESQ.
NORMAN LICHTENSTEIN, ESQ.
BEATRICE ROTHMAN
ANTONE G. SINGSEN III, ESQ.
Of Counsel

ANDREW J. FIORE, ESQ., Corporation Counsel,
Pleasantville, N. Y.
Attorney for the Village of Ossining

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York,

Attorney for Intervenor-Defendant State of New York

JOEL LEWITTES, ESQ.
Assistant Attorney General
Of Counsel

PAUL, WEISS, GOLDBERG, RIFKIND, WHARTON & GARRISON,
New York, New York
Attorneys for Intervening Plaintiffs and Ossining Chamber of Commerce, *Amicus Curiae*

MARTIN LONDON, ESQ.
Of Counsel

PER CURIAM:

This is an application by seven plaintiffs for injunctive and other relief against enforcement of a state statute, section 4-402(b) of the Village Law of New York. The court sits as a statutory three-judge district court under 28 U.S.C. §§ 2281 and 2284. For reasons given below, we grant the preliminary injunctive relief sought.

The three original plaintiffs, Catherine Pierce, George Sarah Taylor and William Taylor, and the four intervening plaintiffs, Gerard T. Butler, Richard B. Smith, Alfred Weiss and Robert Flood, are adult residents of the Village of Ossining in Westchester County in the Southern District of New York. They are all duly registered voters in the State of New York eligible to vote in the general election to be held on November 5, 1968. Defendants are the Village of Ossining of the State of New York, the Board of Trustees of the Village, John G. Donzella, the Mayor of the Village, and William H. Brown, Jr., Timothy L. Cronin, Jr., John A. Leslie and Herman J. Lips, trustees of the Village. Intervening defendant is the State of New York.

The Ossining Chamber of Commerce has filed an amicus brief in support of plaintiffs.

According to the papers before us, including stipulations of fact, and the record of the hearing held on October 31, the following are the pertinent facts: A number of residents of Ossining presented to the Board of Trustees of the Village a petition asking that a proposition be submitted to the voters of the Village; the proposition was for a change in village government from a mayoral system to a village manager system; on August 20, 1968, the Village trustees voted to submit the proposition to the voters at the annual Village election, to be held this year on the date of the general election, i.e., on November 5, 1968; and the trustees of the Village will apply to the Village election the provisions of section 4-402(b) of the Village Law of New York that to be able to vote on the proposition a person must "be an owner of property in the village assessed upon the last preceding assessment-roll thereof." Three of the plaintiffs have been residents of the Village of Ossining for over forty-five years, and at least one of the remaining plaintiffs has been a resident of the Village for five years. However, none of the plaintiffs own property assessed on the last village assessment roll although some of them do own cooperative apartments in the Village.

Plaintiffs claim that section 4-402(b) of the Village Law is unconstitutional, depriving them of the equal protection of the laws (fourteenth amendment) because it denies plaintiffs the right to vote by a classification—property ownership—which is arbitrary and has no reasonable relation to proper qualifications for voting. The complaint seeks a preliminary injunction against enforcing section 4-402(b) in the Village election to be held on November 5, 1968; a permanent injunction against any enforcement at

any time of section 4-402(b); and a declaratory judgment that section 4-402(b) is unconstitutional.

It is noteworthy that the chief arguments presented on behalf of defendants go not to the constitutionality of section 4-402(b) but to various considerations which might lead a court to withhold equitable relief. This reluctance to defend section 4-402(b) on its merits is understandable. The Attorney General of the State of New York is reported to have recommended legislation which would repeal such legislation as section 4-402(b); at least in part the recommendation was because of the doubtful constitutionality of property ownership qualifications for voting or holding office. New York Law Journal, Jan. 19, 1968, page 1. Moreover, we think it is clear that under such decisions as Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), Carrington v. Rash, 380 U.S. 89 (1965), and Landes v. Town of North Hempstead, 20 N.Y. 2d 417, 284 N.Y. S. 2d 441 (1967), section 4-402(b) denies to plaintiffs the equal protection of the laws. The proposition on which plaintiffs have been excluded from voting would work a fundamental change in the village government where they live. Whether that change should be made affects all who live in the Village so that denying the franchise to those who do not own real property is an invidious discrimination.

The effect of that discrimination on this case is startling. The Village of Ossining has approximately 22,300 residents; of these, some 9,840 are registered to vote in the coming election. A substantial part of these voters, however, live in apartment buildings and thus do not meet the requirement of section 4-402(b) that their names appear on the assessment rolls. In one election district, district 22, which contains ten per cent of the electorate, apparently very few, if any, of the voters would be qualified

to vote on the proposition. And in the Village as a whole, there are only apparently 4,500 registered voters whose names also appear on the property assessment rolls. Thus, the effect of section 4-402(b) would be to disqualify approximately 55 per cent of all the voters of the Village.

In opposition to the application, it is urged that plaintiffs may have relief in the courts of New York. This is indeed true and we feel that such applications as this should be made to a forum which has shown itself sensitive to the constitutional rights asserted here. E.g., Landes v. Town of Hempstead, supra. We regret, of course, the necessity of holding a state statute unconstitutional. However, as we construe the applicable decisions, the proper course for us is to rule on the issues before us on the merits, rather than to refer plaintiffs to the state courts. E.g., Zwicker v. Koota, 389 U.S. 241 (1967); Holmes v. New York City Housing Authority, 398 F. 2d 262 (2d Cir. 1968).

It is also urged that only a local law, not a state statute, is involved and that a three-judge court should not deal with "local ordinances or resolutions." Moody v. Flowers, 387 U.S. 97, 101 (1967). The argument is based on the fact that the petition which initiated the proposition to be voted on in the Village election was submitted and accepted under section 23 of the Charter of the Village of Ossining. However, the property qualification for voting on that proposition is not found in the Village Charter but in section 4-402(b) of the Village Law, a state statute which "applies generally" to all village elections upon propositions. Sailors v. Board of Educ., 387 U.S. 105, 107 (1967).

At the hearing before this court, plaintiffs made clear that the primary relief they sought was enjoining the

operation of section 4-402(b) rather than halting the election. For the reasons stated above, we conclude that plaintiffs are entitled to such an injunction. Because of the imminence of the election, the court explored with the parties in open court the question whether it was feasible and advisable to hold the election in such a way that it would not be necessary to have another election regardless of the outcome of the decision of this court or of a reviewing court. Thus, the possibility was explored of using different color paper ballots to facilitate separation of ballots between those who appear on the assessment rolls and those who do not. However, the attorney for the local officials of Ossining maintained that consideration of expense and manpower would make it impracticable to do so. We have concluded that it is not our province to decide that issue. We enjoin the operation of section 4-402(b) so that all who wish to vote on the proposition in the presently scheduled election may do so. We leave it to defendants to decide whether to provide for separation of ballots in an appropriate way or to seek whatever other relief they may wish. We do no more than enjoin the operation of an unconstitutional statute in the Village election.

The above incorporates findings of fact and conclusions of law. The application for a preliminary injunction is granted.

So ordered.

/s/ WILFRED FEINBERG
U. S. C. J.

/s/ JOHN F. X. McGOHEY
U. S. D. J.

/s/ INZER B. WYATT
U. S. D. J.

Dated: New York, N. Y.
November 1, 1968